U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 11, 2006

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

Thank you for your letter dated February 23, 2006. Your letter requests additional information regarding several previous inquiries and responses relating to the Foreign Intelligence Surveillance Act (FISA), information sharing, voluntary interviews, Brandon Mayfield, section 203 of the USA PATRIOT Act and the Violent Gang and Terrorist Organization File (VGTOF). We will address each inquiry below.

Your letter requests access to various documents and additional information to further the Committee's consideration of the renewal of the expiring provisions of USA PATRIOT Act. The USA PATRIOT Improvement and Reauthorization Act (P.L. 109-177) was signed by the President on March 9, 2006.

Since the expiring provisions of the USA PATRIOT Act have now been reauthorized, we expect that your interest in this information may have diminished, but we want to respond to your questions to the extent possible at this point. FISA applications contain operational details and other extremely sensitive intelligence information that is usually beyond the scope of oversight inquiries, and we have not made them available to Members or staff from either House Judiciary or Select Intelligence committees. Upon request from the Judiciary Committee, we would provide a briefing about FISA, and the sharing of FISA derived information with criminal investigators and prosecutors.

Under some circumstances, we also brief committees in response to oversight requests from their chairmen, although the information we would provide in the Mayfield matter would likely be limited by the on-going litigation and our substantial confidentiality interests in deliberative process. Our views regarding those and other oversight matters are more fully set forth in the Department's letter to Chairman John Linder of the House Rules Committee, dated January 27, 2000, a copy of which is enclosed for your convenience. However, for your

convenience, we have enclosed a copy of the Inspector General's Special Report reviewing the FBI's handling of the Mayfield matter.

On September 17, 2002, you wrote then Assistant Attorney General Daniel J. Bryant a letter regarding the May 17, 2002, opinion of the Foreign Intelligence Surveillance Court (FISC). The Department responded on October 31, 2002, and we stand by that response (enclosed). Of course, the May 17, 2002 opinion has since been reversed by the Foreign Intelligence Surveillance Court of Review. See *In re: Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

On November 27, 2001, you wrote the Attorney General regarding the voluntary interview of Americans in the Detroit area following the September 11, 2001, attacks on our country. The Department replied by letter dated January 28, 2002. The Department has nothing to add to its 2002 response.

Section 203(a) provides an exception to the secrecy requirements imposed by Federal Rule of Criminal Procedure 6(e), which limits the extent to which attorneys for the government (and others) may disclose grand jury information. Section 203(a) allows the disclosure of grand jury information to any federal law enforcement, intelligence, protective, immigration, national defense or national security official to assist the official in the performance of that official's duties. When an attorney for the government makes such a disclosure pursuant to 6(e)(3)(D), the court is notified. Section 203(a) does not govern the disclosure of electronic, wire or oral interception information or other criminal investigative information; the sharing of these types of information are primarily governed by section 203(b) and 203(d) respectively. Generally speaking, section 203 has been an important part of our overall prevention strategy because section 203 enhances information-sharing and coordination.

According to our records, prosecutors have notified the Department regarding disclosures of information to the intelligence community less than a dozen times. However, it is likely this number, due to under reporting, underestimates the number of times such disclosures have actually been made. The Department will likely review, in conjunction with the Department's establishment of the new National Security Division, whether any additional guidance regarding reporting of 203(a) to the United States Attorneys Offices is appropriate.

As we have stated on numerous occasions, Congress decides who should not be able to possess a firearm, and has specified certain categories of persons who may not lawfully possess or receive firearms. For example, felons, illegal aliens, and persons convicted of misdemeanor crimes of domestic violence are all prohibited from possessing or receiving a firearm by law. Suspected or actual membership in a terrorist organization, however, is <u>not</u> a prohibited category. Therefore, the FBI cannot legally prohibit people from receiving a firearm based on their alleged association with a terrorist organization, unless they are otherwise prohibited from possessing or receiving a firearm under federal or state law.

On November 17, 2003, the Acting Deputy Attorney General directed the FBI to delay background check transactions that hit on records in the Violent Gang and Terrorist Organization File (VGTOF) of persons identified as known or possible members of violent gangs or terrorist organizations. The delay allows the FBI to coordinate with field personnel who may have information about the person not yet posted in the NICS system revealing that he or she falls into one of the prohibiting categories. Pursuant to this directive, on February 3, 2004, the FBI began delaying NICS transactions hitting on VGTOF records.

Moreover, the Attorney General has asked a Department working group led by the Office of Legal Policy to review whether the Administration should propose legislation addressing the possession by or transfer of firearms to persons on the terrorist watch lists. The working group continues to work through the issue. While we have not yet developed a proposal, we would be happy to review any specific legislation you would like to propose.

Thank you for your attention to these matters. If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable James F. Sensenbrenner, Jr.
Chairman

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2000

The Honorable John Linder
Chairman, Subcommittee on Rules and
Organization of the House
Committee on Rules
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We have carefully reviewed the testimony presented to the Subcommittee on Rules and Organization of the House at its hearing on July 15, 1999, on "Cooperation, Comity, and Confrontation: Congressional Oversight of the Executive Branch." The Department of Justice appreciates the Subcommittee's interest in this area, and we would like to take this opportunity to present in this letter, for the benefit of both Members of Congress and the public at large, the approach we take to the issues raised at the hearing. As always, we are committed to cooperating with your Subcommittee, and all committees of Congress, with respect to the oversight process.

The testimony presented at the hearing suggests to us that there is a need for improved communication and sensitivity between the Executive and Legislative Branches regarding our respective institutional needs and interests. It also suggests that there is considerable misunderstanding about the principles that govern the Department's longstanding positions and practices on responding to congressional oversight requests. We hope that this discussion of those governing principles will be helpful to the Committee and foster an improved understanding of the Department's interests in responding to oversight requests.

General Approach

The oversight process is, of course, an important underpinning of the legislative process. Congressional committees need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law. By helping Congress be better informed when it makes legislative decisions, oversight promotes the accountability of government. The information that committees gather in this oversight capacity is also important for the Executive Branch in the future implementation of the law and its participation in the legislative process. We have found that the oversight process can shed

valuable light on Department operations and assist our leadership in addressing problems that might not otherwise have been clear.

President Reagan's November 4, 1982 Memorandum for the Heads of Executive Departments and Agencies on "Procedures Governing Responses to Congressional Requests for Information" sets forth the longstanding Executive Branch policy on cooperating with Congressional oversight:

> The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.

The D.C. Circuit Court of Appeals has recognized the obligations of Congress and the Executive Branch to seek to accommodate the legitimate needs of the other:

> The framers . . . expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977). Attorney General William French Smith captured the essence of the accommodation process in a 1981 opinion: "The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch." Opinion of the Attorney General for the President, Assertion of Executive Privilege in Response to a Congressional Subpoena, 5 Op. O.L.C. 27, 31 (1981).

In implementing the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative interests while protecting Executive Branch confidentiality interests. Examples of confidential information include national security information, materials that are

protected by law (such as grand jury information pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure and taxpayer information pursuant to 26 U.S.C. § 6103); information the disclosure of which might compromise open criminal investigations or prosecutions or civil cases or constitute an unwarranted invasion of personal privacy; and predecisional deliberative communications (such as internal advice and preliminary positions and recommendations).

We believe that it must be the Department's efforts to safeguard these important Executive Branch institutional interests that have led to the frustrations expressed during the Subcommittee's hearing. We hope that we can reduce those frustrations in the future by setting forth here our perspective on some of the more important institutional interests that are implicated during the course of Congressional oversight.

Open Matters

Much of the testimony at the hearing addressed oversight of ongoing Department investigations and litigation. Although Congress has a clearly legitimate interest in determining how the Department enforces statutes, Congressional inquiries during the pendency of a matter pose an inherent threat to the integrity of the Department's law enforcement and litigation functions. Such inquiries inescapably create the risk that the public and the courts will perceive undue political and Congressional influence over law enforcement and litigation decisions. Such inquiries also often seek records and other information that our responsibilities for these matters preclude us from disclosing. Consequently, we have sought whenever possible to provide information about closed, rather than open, matters. This enables Congress to analyze and evaluate how statutory programs are handled and the Department conducts its business, while avoiding the potential interference that inquiries into open matters entail.

The open matters concern is especially significant with respect to ongoing law enforcement investigations. The Department's longstanding policy is to decline to provide Congressional committees with access to open law enforcement files. Almost 60 years ago, Attorney General Robert H. Jackson informed Congress that:

> It is the position of the Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest . . . .

40 Op. Att'y. Gen. 45, 46 (1941). Attorney General Jackson's position was not new. His letter cited prior Attorney General letters taking the same position dating back to the beginning of the 20th century (id. at 47-48).

The rationale for this policy is set forth in a published opinion of the Office of Legal Counsel issued by Charles J. Cooper, Assistant Attorney General for the Office of Legal Counsel

during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted that providing a Congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. Id. at 76. Congress would become, "in a sense, a partner in the investigation," id., and could thereby attempt to second-guess tactical and strategic decisions, question witness interview schedules, debate conflicting internal recommendations, and generally attempt to influence the outcome of the criminal investigation. Such a practice would significantly damage law enforcement efforts and shake public and judicial confidence in the criminal justice system. Id. at 76-77.

Decisions about the course of an investigation must be made without reference to political considerations. As one Justice Department official noted 30 years ago, "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation." Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Submission of Open CID Investigation Files 2 (Dec. 19, 1969).

In addition to the problem of Congressional pressure and the appearance of such pressure, the disclosure of documents from our open files could also provide a "road map"of the Department's ongoing investigations. The documents, or information that they contain, could come into the possession of the targets of the investigation through inadvertence or a deliberate act on the part of someone having access to them. The investigation would be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation. As Attorney General Jackson observed:

> Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Atty. Gen. at 46. The Department has similar interests in the confidentiality of internal documents relating to its representation of the United States in civil litigation. Our litigation files usually contain confidential correspondence with client agencies as well as the work product of our attorneys in suits that frequently seek millions of tax dollars. They also contain "road maps" of our litigation plans and preparations, as well as confidential reports from experts and consultants. Those plans could be seriously jeopardized and our positions in litigation compromised if we are obliged to disclose our internal deliberations including, but not limited to,

our assessments of the strengths and weaknesses of evidence or the law, before they are presented in court. That may result in an unfair advantage to those who seek public funds and deprive the taxpayers of confidential representation enjoyed by other litigants.

In addition, the reputations of individuals mentioned in internal law enforcement and litigation documents could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution or other legal action. The Department takes very seriously its responsibility to respect the privacy interests of individuals about whom information is developed during the law enforcement process or litigation.

Internal Department Deliberations

With respect to oversight on closed matters, the Department has a broad confidentiality interest in materials that reflect its internal deliberative process. In particular, we have sought to ensure that all law enforcement and litigation decisions are products of open, frank and independent assessments of the pertinent law and facts -- uninhibited by political and improper influences that may be present outside the Department. We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believed that their honest opinion -- be it "good" or "bad"-- may be the topic of debate in Congressional hearings or floor debates. These include assessments of evidence and law, candid advice on strengths and weaknesses of legal arguments, and recommendations to take or not to take legal action against individuals and corporate entities.

The Department must seek to protect this give-and-take process so that the participants in the process can vigorously debate issues before them and remain able to provide decisionmakers with complete and honest counsel regarding the conduct of the Department's business. If each participant's contribution can be dissected by Congress in a public forum, then the free and candid flow of ideas and recommendations would certainly be jeopardized. The Supreme Court has recognized the legitimacy of this "chilling effect" concern: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). Our experience indicates that the Department can develop accommodations with Congressional committees that satisfy their needs for information that may be contained in deliberative material while at the same time protecting the Department's interest in avoiding a chill on the candor of future deliberations.

The foregoing concerns apply with special force to Congressional requests for prosecution and declination memoranda and similar documents. These are extremely sensitive law enforcement materials. The Department's attorneys are asked to render unbiased, professional judgments about the merits of potential criminal and civil law enforcement cases. If their deliberative documents were made subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providing the candid and independent analysis essential to just and effective law enforcement or, just as troubling, that

they might err on the side of prosecution simply to avoid public second-guessing. This in turn would undermine public and judicial confidence in our law enforcement processes, untoward consequences we are confident that Congress, like the Department, wishes to avoid.

Privacy

In addition to these concerns, disclosure of declination memoranda would implicate significant individual privacy interests as well. Such documents discuss the possibility of bringing charges against individuals who are investigated but not prosecuted, and often contain unflattering personal information as well as assessments of witness credibility and legal positions. The disclosure of the contents of these documents could be devastating to the individuals they discuss. We try to accommodate Congressional needs for information about declinations whenever possible by making appropriate Department officials available to brief Committee Members and staff. This affords us an opportunity to answer their questions, which can be helpful because it can include the context and process that accompanied the decision. Hence, the discussion with staff may provide useful information and minimize the intrusion on individual privacy and the chill on our attorneys' preparation of future deliberative documents.

Line Attorneys

The Department also has a strong institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions. This is based in part upon our view that supervisory personnel, not line employees, make the decisions that are the subjects of congressional review, and therefore they should be the ones to explain the decisions. More fundamentally, however, we need to ensure that our attorneys and agents can exercise the independent judgment essential to the integrity of law enforcement and litigation functions and to public confidence in those decisions. Senator Orrin Hatch has recognized the legitimacy of the Department's practice in this area, observing that Congressional examination of line attorneys "could chill career Department of Justice lawyers in the exercise of their daily duties." See Letter to Attorney General Janet Reno from Senator Orrin Hatch, dated September 21, 1993. Representative Henry Hyde has likewise opposed Congressional interviews of line prosecutors. See Letter of Representative Hyde to Representative Carlos Moorhead, dated September 7, 1993. By questioning supervisors and ultimately the Department's Senate-confirmed leadership, Congress can fulfill its oversight responsibilities without undermining the independence of line attorneys and agents.

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In sum, the Department recognizes that the process of Congressional oversight is an important part of our system of government. We are committed to cooperating with oversight requests to the fullest extent consistent with our constitutional and statutory responsibilities.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 31, 2002

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

We have received your letter dated September 17, 2002. The information we have provided to you on July 26 and September 13, 2002, regarding the Foreign Intelligence Surveillance Act of 1978 and its amendment in the USA PATRIOT Act is accurate. The complicated issues involved in implementing the authorities granted in those Acts in no way affect the accuracy of the information we have provided.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 28, 2002

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Conyers:

Thank you for your letter to the Attorney General, dated November 27, 2001, concerning the Department of Justice's request for interviews in the metropolitan Detroit area.

The Department of Justice is asking for voluntary interviews with a number of individuals who have entered this country on non-immigrant visas who may have information helpful in our effort to investigate the attacks of September 11th and to prevent future terrorism. As has been the case throughout this investigation, whenever we identify individuals who may have information helpful to the investigation or to our effort to disrupt potential terrorist activity, we will attempt to interview them. The persons interviewed are not suspects, but simply people with whom we wish to talk because we believe they may be helpful to the investigation.

The individuals discussed in your letter were selected for voluntary interview requests because they fit a number of criteria of persons who might have knowledge of foreign-based terrorists, criteria that are shared by many of the people who have thus far provided valuable information to law enforcement. These criteria include, but are not limited to, the following (1) they entered the United States with a passport from a country where intelligence indicates Al Qaeda has a presence or conducts activities; (2) they entered the United States after January 1, 2000; and (3) they are males between the ages of 18 and 33. These individuals were not selected in order to single out a particular ethnic or religious group; indeed, the individuals are from countries of diverse ethnicities and the individuals were selected without any knowledge as to their religious beliefs. They were selected because the criteria indicate that they might, wittingly or unwittingly, be in the same circles, communities, and/or social groups as those who participate in, or know others who participate in, activities related to foreign-based terrorism. As such, this effort is akin to canvassing a neighborhood where a crime has occurred, which is an accepted and indispensable aspect of any significant criminal investigation. There, as here, being asked for an interview does not suggest involvement in any crime–just the possibility that the person may have information relevant to the case.

Jeffrey Collins, the United States Attorney for the Eastern District of Michigan, chose to implement the interview initiative by sending letters requesting interviews. The letters clearly state that the interviews are voluntary and that the recipient of the letter is not suspected of any wrongdoing. We have enclosed a sample for your review. Furthermore, the recipient of the letter may choose the location of the interview, and indeed decide whether or not to be interviewed at all. There are no adverse ramifications for declining an interview request.

The Deputy Attorney General has issued guidance to all United State Attorneys' offices regarding how these interviews should be handled. Individuals will be asked questions that will reasonably assist in the effort to learn more about those who support, commit, or associate with persons who commit terrorism. The interviews are consensual. The guidelines specifically state that no inquiry should be made into an individual's religious beliefs and practices. Because the Department is committed to enforcing civil rights laws and prosecuting crimes motivated by religion or ethnicity, interviewees will also be asked whether they have been subject to violence or threats because of their religion or nationality. We have enclosed a copy of the Attorney General's November 9, 2001, directive concerning the interviews, and the Deputy Attorney General's November 9, 2001, guidance to United States Attorneys.

The interviewing project has received the support of Federal, State, and local law enforcement in eastern Michigan. Since your letter of November 27th, the Detroit Police Department has fully committed to the program. Police Chief Charles Wilson has dedicated significant personnel to conduct the interviews.

I hope this information is helpful to you. Please do not hesitate to contact us if we can be of further assistance in this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

Enclosures

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman